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2 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 STANLEY and BETTY PELLETZ, by
11 themselves and on behalf of themselves
12 and all others similarly situated,

13 Plaintiffs,

14 v.

15 WEYERHAEUSER COMPANY and
16 ADVANCED ENVIRONMENTAL
17 RECYCLING TECHNOLOGIES, INC.,

18 Defendants.

19 NO. C08-0334 JCC

20 JOSEPH JAMRUK, STACEY JAMRUK,
21 MICHAEL MUSTAC, and GREG
22 KNUDTSON, on behalf of themselves and
23 all others similarly situated,

24 Plaintiffs,

25 v.

26 ADVANCED ENVIRONMENTAL
RECYCLING TECHNOLOGIES, INC., a
Delaware corporation; WEYERHAEUSER
COMPANY, a Washington corporation,

Defendants.

NO. C08-0403 JCC

**ORDER GRANTING FINAL APPROVAL
OF CLASS ACTION SETTLEMENT, AND
DISMISSING CLASS ACTION WITH
PREJUDICE**

Date: January 8, 2009

Time: 9:00 a.m.

Courtroom: 16206

Judge: John C. Coughenour

1 This matter comes before the Court on Plaintiffs' Motion for Final Approval of the Class
2 Action Settlement (Dkt. No. 120). The Court has carefully considered the motion and all
3 declarations and exhibits filed in support of the motion as well as the balance of the record in this
4 case, including the arguments presented in Court at the fairness hearing on January 8, 2009. The
5 Court hereby finds and rules as follows.
6

7 **I. BACKGROUND**
8

9 This case consolidates two putative class action lawsuits (the "*Pelletz*" case, C08-0334-
10 JCC, and the "*Jamruk*" case, C08-0403-JCC) against Defendants Weyerhaeuser Company and
11 Advanced Environmental Technologies, Inc. ("AERT") for allegedly defective deck-building
12 products. The product at issue, ChoiceDek, is composed of a blend of plastics and recycled wood
13 fibers. (Consolidated Master Am. Compl. ¶ 6.1 (Dkt. No. 25 at 5).) Plaintiffs allege that a defect
14 in ChoiceDek decking and railing products manufactured between January 1, 2004, and October
15 1, 2006, results in fungal, mold, or mildew growth that causes extensive permanent discoloration
16 that is not discernibly more prevalent in any particular geographical region. (*Id.* ¶¶ 6.3, 6.8.)
17 Plaintiffs allege that Defendants knew about the defect but concealed it from consumers. (*Id.* ¶
18 1.3.) Plaintiffs contend that despite knowing of this defect, Defendants marketed ChoiceDek as
19 "virtually maintenance free" and charged a premium for this benefit. (Mot. 2 (Dkt. No. 120 at
20 8).)
21

23 The named Plaintiffs are residents of Florida, Illinois, New Jersey, and Washington, each
24 of whom purchased and installed the ChoiceDek product only to find significant mold spotting
25 on their deck within a relatively short period of time. (Consolidated Master Am. Compl. ¶¶ 2.1–
26 2.4 (Dkt. No. 25 at 2–3).) The problems Plaintiffs encountered were allegedly not remediable by

1 reasonable cleaning methods. (*Id.*) As such, the named Plaintiffs ultimately contacted counsel,
2 who initiated extensive investigation on ChoiceDek decks around the country and obtained
3 expert evaluation of Plaintiffs' claims against AERT and Weyerhaeuser Company. Settlement
4 discussions began soon after the Jamruks' counsel contacted Defendants in 2007. (Mot. 1 (Dkt.
5 No. 120 at 7).) Beginning in March 2008, the Pelletzes' counsel joined the Jamruks' counsel in
6 completing settlement negotiations with Defendants. (*Id.*) In the meantime, the named Plaintiffs
7 filed class action complaints in this Court against Defendants, first separately and then as a
8 consolidated action. (Consolidated Master Amended Class Action Compl. (Dkt. No. 25).) By the
9 end of summer 2008, however, the parties had reached a settlement and filed the Settlement
10 Agreement with this Court for preliminary approval on August 21, 2008. (Settlement Agreement
11 (Dkt. No. 40-2); Addendum (Dkt. No. 186-2) (correcting a typo).)

14 On September 15, 2008, the Court issued an order preliminarily certifying a class for
15 settlement purposes, appointing lead counsel for the class, directing the issuance of notice to the
16 class, and scheduling a fairness hearing. (Dkt. No. 50.) The parties selected The Garden City
17 Group, Inc. to serve as the Class Notice Administrator to effectuate notice to the potential class
18 members. (Keough Aff. ¶ 2 (Dkt. No. 136 at 2).) Because the exclusive retailer of ChoiceDek
19 products, Lowe's HIW, Inc., had comprehensive customer records, the parties were able to mail
20 387,214 class notices to notify the approximately 110,000 to 140,000 class members. Of those
21 notices, only 13,131 were returned as undeliverable with no forwarding address. (Supplemental
22 Keough Aff. ¶ 3 (Dkt. No. 174 at 2–3).) In addition, a class notice was published in the weekend
23 edition of *USA Today* on November 7, 2008. (Keough Aff. ¶ 10 (Dkt. No. 136 at 8).) AERT also
24 made a website available online. (*Id.*) A toll-free number was established to assist potential class
25 members with questions. (*Id.* at ¶¶ 10–11.) The parties issued a joint press release. (*Id.* at ¶ 12.)
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1 Finally, the parties complied with the notice requirements of the Class Action Fairness Act, 28
2 U.S.C. § 1715, with regard to notifying the appropriate state and federal officials of the proposed
3 settlement. (*Id.* at ¶ 13.)
4

5 The class notice notified potential class members of a December 15, 2008, deadline by
6 which class members could file objections or opt out of the proposed class settlement. (Notice
7 (Dkt. No. 136 at 11).) By that date, only ninety-one potential class members opted out and only
8 three class members objected to the settlement. (Pls.’ Mem. 1 (Dkt. No. 173 at 4).) One objector,
9 Mr. Ted Volin, appeared at the fairness hearing on January 8, 2009, in support of his previously
10 filed written objection. (Dkt. No. 92.) The parties argued at the hearing that the Court should
11 finally approve the proposed class settlement because it is fair, reasonable, and adequate, and
12 because it was reached as a product of vigorous, arms’ length negotiations over the course of
13 many months between competent and experienced counsel. Plaintiffs also ask the Court to grant
14 their motion for attorney’s fees, which the Court will address in a separate order.
15
16

17 II. ANALYSIS

18 The Court approves the following, which is based on both Plaintiffs’ counsel’s proposed
19 order and the Court’s own reasoning.

20 1. Incorporation of Defined Terms. Except where otherwise noted, all capitalized
21 terms used in this Final Order Approving Class Action Settlement and Dismissing Class Action
22 with Prejudice (the “Final Order and Judgment”) shall have the meanings set forth in the
23 Settlement Agreement and Addendum, which are incorporated by reference hereto. The
24 Settlement Agreement and Addendum are expressly incorporated by reference into this Final
25 Order and Judgment and made a part hereof for all purposes. The Settlement Agreement is
26

1 attached as Appendix B. The Addendum is attached as Appendix C. For the remainder of this
2 Final Order and Judgment, the Settlement Agreement and Addendum are collectively referred to
3 as the “Settlement Agreement.”

4 2. Jurisdiction. The Court has personal jurisdiction over the parties and all Class
5 Members, and has subject-matter jurisdiction over this action, including, without limitation,
6 jurisdiction to approve the proposed settlement, to grant final certification of the Class, to settle
7 and release all claims arising out of the transactions alleged in the Plaintiffs’ consolidated
8 complaint, and to dismiss this action on the merits and with prejudice.

9 3. Final Class Certification. The Court finds that the requirements for class
10 certification, for settlement purposes only, are met in the instant case. The Federal Rules require
11 (1) numerosity, (2) commonality, (3) typicality, and (4) representativity before a class may be
12 certified. FED. R. CIV. P. 23(a). In addition, the putative class action must fit one of the scenarios
13 described in Rule 23(b). Here, numerosity is satisfied because the parties estimate that the Class
14 consists of between 110,000 and 140,000 ChoiceDek deck owners. Additionally, Plaintiffs’
15 counsel has been contacted by approximately 900 potential Class members. Therefore, the Class
16 is so numerous that joinder of all the members would be impracticable. Second, commonality
17 exists because all Class members allegedly share the same problem: a defect in their ChoiceDek
18 product causing significant recurring molding problems on their decks. Common questions
19 include whether the product is defective, whether Defendants knew or should have known of the
20 defect, and whether Defendants made material misrepresentations in ChoiceDek marketing
21 materials. Typicality is present because the named Plaintiffs and the Class members share the
22 same claims based on Defendants’ sale of a product with an allegedly known defect.
23 Representativity exists in that the named Plaintiffs and the Class are represented by qualified and
24
25
26

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1 competent counsel who fairly and adequately represent the interests of the Class. The named
2 Plaintiffs' interests do not conflict with the interests of the Class, as they share the same injury,
3 seek the same relief, and have demonstrated a willingness to represent the Class by participating
4 in the investigation and the settlement process.
5

6 Finally, the Court finds that the questions of law and fact common to the Class
7 predominate over any questions affecting only individual members and that a class action is
8 superior to other available methods for fairly and efficiently adjudicating this controversy.
9 Among other things, the fact that Defendant AERT is not aware of any other litigation on this
10 subject matter pursued by potential Class members since the instant class action was filed
11 supports this finding. In addition, since the parties have already reached a settlement,
12 management issues do not present a difficulty. Rather, class treatment here, in the context of the
13 settlement, will facilitate the favorable resolution of all Class members' claims. The Claims
14 Resolution Process will identify and resolve complaints without burdening the courts or the
15 regulators and will result in the cleaning or replacement of Class members' decks.
16

17 Accordingly, the Class this Court previously preliminarily certified in its Preliminary
18 Approval Order is hereby finally certified for settlement purposes under Fed. R. Civ. P. 23(b)(3).
19

20 The Class consists of:

21 All persons and entities who own decks constructed of Product originally
22 purchased on or after January 1, 2004, and before January 1, 2008, and
23 additionally persons and entities who own decks constructed of Product originally
24 purchased after December 31, 2007, and can establish that the Product was
25 manufactured between January 1, 2004, and October 1, 2006, using the
26 manufacture date stamped into the end of the Product. Included within the Class
are the legal representatives, heirs, successors in interest, transferees and assigns
of all such foregoing holders and/or owners, immediate and remote, who currently
own decks constructed of Product originally purchased on or after January 1,
2004, and before January 1, 2008 (the "Class").

1 Notwithstanding the foregoing, the following Persons shall be excluded from the Class:
2 (1) Defendants and their subsidiaries and affiliates; (2) all Persons who make a timely election to
3 be excluded from the proposed Class; (3) governmental entities; and (4) the judge(s) to whom
4 this case is assigned and any immediate family members thereof. In addition, notwithstanding
5 the foregoing, all claims for personal injury and wrongful death are excluded from the Class.
6

7 A list of those persons who have timely excluded themselves from the Class, and who therefore
8 are not bound by this Final Order and Judgment, is attached hereto as Appendix A, which is
9 incorporated herein and made a part hereof for all purposes.

10 4. Adequacy of Representation. The Court appoints Stanley Pelletz, Betty Pelletz,
11 Joseph Jamruk, Stacey Jamruk, Michael Mustac, and Greg Knudtson to serve as Class
12 Representatives. The Court appoints Tousley Brain Stephens PLLC; Lieff Cabraser Heimann &
13 Bernstein, LLP; Goldenberg Heller Antognoli Rowland & Short, P.C.; Hausfeld LLP; Gary,
14 Naegele & Theado, LLC; and Keller Rohrback LLP to serve as Class Counsel. The appointment
15 of Jonathan D. Selbin and Jori Bloom Naegele as Lead Class Counsel for the Class, the
16 appointment of Class Counsel, and the appointment of the Plaintiffs as the Class representatives,
17 is fully and finally confirmed. The Court finds that Lead Class Counsel, Class Counsel, and the
18 Plaintiffs have fully and adequately represented the Class for purposes of entering into and
19 implementing the settlement and have satisfied the requirements of Fed. R. Civ. P. 23(a)(4).
20

21 5. Class Notice. The Court finds that the distribution of the Class Notice and the
22 publication of the Publication Notice in accordance with the terms of the Settlement Agreement
23 and this Court's Preliminary Approval Order, and as explained in the declarations and affidavits
24 filed before the Fairness Hearing:

- (a) constituted the best practicable notice to Class Members under the circumstances of this action;
 - (b) were reasonably calculated, under the circumstances, to apprise Class Members of (i) the pendency of this class action, (ii) their right to exclude themselves from the Class and the proposed settlement, (iii) their right to object to any aspect of the proposed settlement (including final certification of the settlement class, the fairness, reasonableness or adequacy of the proposed settlement, the adequacy of the Class's representation by Plaintiffs or Class Counsel, and/or the award of attorneys' and representative fees), (iv) if they did not exclude themselves from the Class, their right to appear at the Fairness Hearing (either on their own or through counsel hired at their own expense), and (v) the binding effect of the orders and Final Order and Judgment in this action, whether favorable or unfavorable, on all persons who do not request exclusion from the Class;
 - (c) was reasonable and constituted due, adequate and sufficient notice to all persons entitled to be provided with notice; and
 - (d) fully satisfied the requirements of the Federal Rules of Civil Procedure, including Fed. R. Civ. P. 23(c)(2) and (e), the United States Constitution (including the Due Process Clause), the Rules of this Court, and any other applicable law.

The Parties have provided the necessary notice under the Class Action Fairness Act, 28 U.S.C. § 1715.

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1 6. Final Settlement Approval. The terms and provisions of the Settlement
2 Agreement, including any and all other amendments, addendums (*see* Dkt. No. 186-2) and
3 exhibits, have been entered into in good faith and are hereby fully and finally approved as fair,
4 reasonable and adequate as to, and in the best interests of, the Plaintiffs and the Class Members,
5 and in full compliance with all applicable requirements of the Federal Rules of Civil Procedure,
6 the United States Constitution (including the Due Process Clause), and any other applicable law.
7

8 In considering whether the Settlement Agreement is fair, adequate, and reasonable, the
9 Court has balanced a number of factors, including: (1) the strength of the Plaintiffs' case; (2) the
10 risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining the
11 class action throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery
12 completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the
13 presence of a governmental participant; and (8) the reaction of the Class members to the
14 proposed settlement. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) ("To
15 survive appellate review, the district court must show it has explored comprehensively all
16 factors."). The Court is also mindful that "although 'strong judicial policy . . . favors
17 settlements,' *see Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992), the
18 settlement may not be the product of collusion among the negotiating parties." *Churchill Vill.,*
19 *LLC v. GE*, 361 F.3d 566, 576 (9th Cir. 2004).

20 The Court finds that the Settlement Agreement is fair, adequate and reasonable. As a
21 preliminary matter, the Court finds no evidence of fraud or collusion underlying this settlement.
22 It was reached after good faith, arms-length negotiations that began soon after the Jamruks'
23 counsel contacted Defendants in 2007 and ended in the August 2008 Settlement Agreement.
24 Both Plaintiffs' counsel and Defendants' counsel represented to this Court at the fairness hearing
25

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1 that the negotiations were in good faith, and the Court found these representations to be credible.

2 In addition, the Court has considered the following factors:

- 3 (a) The strength of the Plaintiffs' case: The Court finds that the strength of
4 Plaintiffs' case supports approval of the class settlement. Defendants argue
5 that mold and mildew can grow on any item left outdoors. (AERT Answer ¶
6 6.3 (Dkt. No. 29 at 4).) Without reaching the actual merits of Plaintiffs' case,
7 the Court is not convinced that Plaintiffs' case is so strong that its bargaining
8 position should have resulted in a more generous benefit for the Class.
9
- 10 (b) The risk, expense, complexity, and likely duration of further litigation: Again,
11 the Court is not convinced that Plaintiffs' case is so strong that the inherent
12 risks of trying the case before a jury would have been obviated. In addition,
13 pursuing trial would have delayed the distribution of any benefits to the Class
14 and would likely have incurred far more expenses. Further, the settlement
15 ensures recovery for the Class by taking into account Defendant AERT's
16 financial condition, as the company apparently has cash flow limitations. The
17 settlement is designed to work within those limitations.
18
- 19 (c) The risk of maintaining the class action throughout the trial: The Court finds
20 that the risk of maintaining the class action throughout the trial was probably
21 minimal; however, the balance of these factors favors approval, and the Court
22 is not persuaded that this factor alone militates a different result.
23
- 24 (d) The amount offered in settlement: The settlement provides substantial relief
25 to the Class members, summarized as follows. For Class members whose
26 decks exhibit "Significant Mold Spotting," (which is determined by an

analysis of photographs submitted by the Class member) and who agree to allow AERT to inspect their deck and take a small sample for testing will receive one free cleaning and the application of a mold inhibitor. Whether or not the Class member is entitled to further relief depends upon whether mold returns within 18 months. If it does not return, then the Class member is not entitled to further relief, but their rights under the original warranty are preserved except for those relating to claims arising from mold. This is because the Class member will then have what he or she paid for: a deck without significant mold spotting.

If the mold returns within 18 months, then the Class member has two options. First, she or he can choose to have the deck tested. If the sample does not meet a minimum plastic percentage requirement, then the claimant is entitled to 100% cash reimbursement of the purchase price, new ChoiceDek material for the construction of a new deck, or three additional annual cleanings along with mold inhibitor applications. Second, the Class member has the option of obtaining various levels of relief depending on four factors designed to assess the severity of the problem. If, after an initial cleaning and mold inhibitor application, the mold returns within six months, and the boards were properly gapped, the claimant periodically cleaned the deck as recommended in the past, and the claimant continued to clean the deck periodically after the initial cleaning by AERT, then the claimant is entitled to a 100% reimbursement or three additional annual cleanings and inhibitor applications. If the mold returns within six and eighteen months, the claimant

1 is eligible for a combination of rebate vouchers, additional cleanings, and/or
2 coupons for deck cleanings. In addition, Defendants are required to
3 discontinue advertising the product as maintenance-free, are required to
4 maintain a Customer Service Hotline to answer questions regarding
5 maintenance, and AERT is required to provide maintenance information on its
6 website. The Court finds that these benefits are adequate, fair, and reasonable
7 to the Class members.

9 (e) The extent of discovery completed and the stage of the proceedings: Although
10 formal discovery was not completed in this case, the parties engaged in
11 extensive investigation of Plaintiffs' claims, including the lab testing of
12 fourteen decks around the country. The parties exchanged expert reports of a
13 mycologist and a wood scientist and lab analyses of the samples. Plaintiffs'
14 counsel received confidential, proprietary information on ChoiceDek product
15 formulation. Additionally, Plaintiffs' counsel was in contact with over 900
16 absent Class members and gathered detailed information from almost 500 of
17 them about their experiences and problems with the ChoiceDek product. By
18 the time the settlement was reached, the parties had discovered sufficient
19 information to determine the relative strengths and weaknesses of their
20 respective positions. Both sides were well-prepared to reach an adequate
21 settlement and decide on appropriate remedies based on the strengths and
22 weaknesses of their bargaining positions ascertained during the investigation.

23 (f) The experience and views of counsel: Class counsel are highly experienced in
24 class action litigation, as supported by their declarations and the exhibits

1 attached thereto. The fact that they view the settlement as fair, reasonable, and
2 adequate supports the Court's finding the same.

3 (g) The presence of a governmental participant: The Court has considered the
4 fact that no governmental agent has responded to the proposed settlement,
5 despite the class settlement notifications sent to the appropriate federal and
6 state officials.

7 (h) The reaction of the Class members to the proposed settlement: The positive
8 response to the Settlement by the Class – evidenced by a very small
9 percentage of opt-outs and objections – further supports final approval. Of the
10 estimated 110,000 to 140,000 Class members, only 119 opted out and only
11 three (3) objected. *Compare Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 577
12 (9th Cir. 2004) (affirming the district court's approval where 45 of 90,000
13 notified Class members objected to the settlement, and 500 Class members
14 opted out of the settlement). Plaintiffs' counsel represented at the fairness
15 hearing that those who opted out largely did so on grounds that they did not
16 personally have any problems with their ChoiceDek deck, that they thought
17 the relief was inadequate, or that they did not approve of class actions in
18 general. The Court notes that it was not verified that all of those who opted
19 out were actually Class members.

20 The Court has considered the objections of Ted Volin (Docket No. 92),
21 Kevin and Karilee Olsen (Docket No. 147), and Lane Downs (Docket No.
22 148), and hereby overrules them. The three objectors generally argue that the
23 Settlement could have been better by providing different or additional relief,

1 or by utilizing a different claims procedure. However, as the Ninth Circuit
2 has made clear, the Court's inquiry "is not whether the final product could be
3 prettier, smarter or snazzier, but whether it is fair, adequate and free from
4 collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).
5
6 The Court finds that the Settlement meets this standard.

7 Mr. Volin installed a 998-square-foot ChoiceDek deck in 2006 at his home
8 on Vashon Island, Washington. (Dkt. No. 92.) He seems to take the position
9 that this action should be dismissed because homeowners can simply clean
10 their decks periodically with aggressive, environmentally friendly techniques,
11 such as using a pressure-washer, which he used to good effect. He also argues
12 that the claim forms and photographic proof required for compensation are too
13 complicated and time-consuming for the average homeowner to complete. In
14 addition, he complains that there is no provision in the settlement for
15 recovering the labor cost of the initial installation of the deck.
16

17 However, the Court finds that the claims process is reasonable, as it only
18 requires that Class members answer two reasonable claim forms and submit a
19 total of 10 photographs of the mold spotting. This is far less than the Class
20 members would have to produce in order to pursue individual litigation of
21 their claims. Also, if the photographs are not adequate or the claimant fails to
22 provide other requested information, AERT will notify the claimant and ask
23 that they supplement their claim. There is a toll-free number established to
24 assist with claims. In addition, the Court finds that the Settlement benefits –
25 which include full materials costs reimbursement or full replacement material

1 under certain circumstances – are fair and reasonable in light of the parties'
2 claims and defenses. Labor costs would have been a hotly contested issue,
3 since the express warranty does not provide for labor and since the product
4 does not completely fail but merely requires allegedly unreasonable
5 maintenance efforts. For these reasons, Mr. Volin's objection is overruled.
6

7 The Olsens purchased ChoiceDek decking materials based on Defendants'
8 representations that the materials had a longer warranty period and that the
9 materials would be maintenance free. (Dkt. No. 147.) They object to the
10 settlement on grounds that it is not fair to completely release Defendants from
11 any claims the Olsens may have against them and on grounds that the
12 settlement benefits are inadequate. However, Class members retain their rights
13 under the original warranty, except for mold issues (unless personal injury or
14 wrongful death is alleged). Therefore, the Court finds that the scope of the
15 release is appropriate. If Class members did not want to agree to this release,
16 they were free to opt out of the settlement. In addition, under the settlement,
17 the Olsens may be entitled to a full replacement or full cash refund if their
18 deck meets certain requirements. Therefore, it is not clear to the Court that
19 the settlement benefits are inadequate as to the Olsens or as to any Class
20 members.

21 Finally, Mr. Downs spent over \$6,000 for his ChoiceDek deck. He argues
22 that labor to remove and replace the boards will cost over \$5,200. He asks
23 rhetorically, "Why would I want an offer to clean and apply a mold inhibitor
24 to my supposed low maintenance deck?" and further queries why relief is
25

1 dependent on the efficacy of the mold inhibitor. He also argues that it is
2 onerous to have to show proof of cleaning history, especially when the deck
3 was supposed to have been maintenance-free.
4

5 The Court finds that, for reasons stated above, it is reasonable for the
6 settlement benefits not to include the cost of labor. In addition, the Court finds
7 the rationale for the remedies system to be reasonable: if the deck fails to
8 develop mold after a cleaning and application of a mold inhibitor, then the
9 Class member essentially has what he paid for—that is, a deck that can be
10 kept clean with reasonable maintenance. Apparently, AERT recommended to
11 its customers that they clean their decks twice a year. Therefore, it is
12 reasonable for claimants to have to show some proof of cleaning history.
13 Without such a requirement, AERT would have argued that lack of routine
14 maintenance contributed to mold growth. Plaintiffs' counsel reasonably took
15 this legitimate argument into account when negotiating the settlement. The
16 Court notes that claimants are only required to verify on their claims form that
17 they cleaned their deck twice a year using homemade or commercial cleaners.
18 No receipts or other verification of cleaning is required. (*See* Dkt. Nos. 40-2 at
19 64, 69.)
20

22 Therefore, the Court finds that the cleaning requirement is appropriately
23 included in the claims procedure, given the relevance of this issue to the
24 parties' claims and defenses. The Court also finds that the prior cleaning
25 requirement is included in a fair and reasonable manner, particularly since
26

Class members who do not meet it are still eligible for substantial relief,

including the highest tier of relief under certain circumstances. The Court has therefore considered and hereby overrules Mr. Downs' objection.

Accordingly, the Court overrules all objections and approves the Settlement as fair, adequate, and reasonable. The Parties and Class Members are hereby directed to implement and consummate the Settlement Agreement according to its terms and provisions.

7. Retention of Arbitrator and Administrator. The Parties are authorized to appoint an Arbitrator for the Claim Resolution Process in accordance with the terms of the Settlement Agreement.

8. Binding Effect. The terms of the Settlement Agreement, and of this Final Order and Judgment shall be forever binding on Plaintiffs and all other Class Members, as well as their heirs, executors and administrators, successors and assigns, and those terms shall have res judicata and other preclusive effect in all pending and future claims, lawsuits or other proceedings maintained by or on behalf of any such persons, to the extent those claims, lawsuits or other proceedings involve matters that were or could have been raised in this action or are otherwise encompassed by the Release described in the next paragraph of this Final Order.

9. Release. The Release contained in Section 6 of the Settlement Agreement is expressly incorporated herein in all respects, is effective as of the date of this Final Order and Judgment, and forever discharges the Released Parties from any claims or liabilities arising from or related to this Action.

10. Permanent Injunction. All Class Members who have not been timely excluded from the Class are hereby permanently barred and enjoined from (a) filing, commencing, prosecuting, maintaining, intervening in, participating in (as Class members or otherwise), or

1 receiving any benefits or other relief from, any other lawsuit, arbitration, or administrative,
2 regulatory or other proceeding or order in any jurisdiction based on or relating to the claims and
3 causes of action, or the facts and circumstances relating thereto, in this Action and/or the matters
4 released in the Release, and (b) organizing or soliciting the participation of any Class Members
5 in a separate class for purposes of pursuing as a purported class action (including by seeking to
6 amend a pending complaint to include class allegations, or by seeking class certification in a
7 pending action) any lawsuit or other proceeding based on or relating to the claims and causes of
8 action, or the facts and circumstances relating thereto, in this Action and/or the matters released
9 in the Release. The Court finds that issuance of this permanent injunction is necessary and
10 appropriate in aid of the Court's jurisdiction over this action and to protect and effectuate the
11 Court's Final Order and Judgment.

14 11. Enforcement of Settlement. Nothing in this Final Order and Judgment shall
15 preclude any action to enforce the terms of the Settlement Agreement; nor shall anything in this
16 Final Order and Judgment preclude Plaintiffs or Class Members from participating in the Claim
17 Resolution Process described in the Settlement Agreement if they are entitled to do so under the
18 terms of the Settlement Agreement.

20 12. Attorneys' and Class Representative's Fees and Expenses. The Agreement
21 provides for attorneys' fees and reimbursement of their expenses in the amount of
22 \$1,750,000.00, and stipends to the Class representatives as follows: \$7,500.00 to Joseph and
23 Stacey Jamruk; \$7,500.00 to Michael Mustac; \$7,500.00 to Greg Knudtson; and \$7,500.00 to
24 Stanley and Betty Pelletz. The Court will issue a separate order addressing these fees and
25 stipend requests.

13. No Other Payments. The preceding paragraph of this Final Order and Judgment covers, without limitation, any and all claims for attorneys' fees and expenses, representative fees, costs or disbursements incurred by Lead Counsel or any other counsel representing the Plaintiffs or Class Members, or incurred by the Plaintiffs or the Class Members, or any of them, in connection with or related in any manner to this action, the settlement of this action, the administration of such settlement, and/or the matters released in the Release except to the extent otherwise specified in this Final Order and Judgment and the Settlement Agreement. Defendants shall be liable to Plaintiffs and the Class Members for no additional attorneys' fees, representative fees, or expenses. All costs of court are taxed against the parties incurring same.

14. **Retention of Jurisdiction.** The Court has jurisdiction to enter this Final Order and Judgment. Without in any way affecting the finality of this Final Order and Judgment, this Court expressly retains jurisdiction as to all matters relating to the administration, consummation, enforcement and interpretation of the Settlement Agreement and of this Final Order and Judgment, including, without limitation, for the purpose of:

- (a) enforcing the terms and conditions of the Settlement Agreement and resolving any disputes, claims or causes of action that, in whole or in part, are related to or arise out of the Settlement Agreement, and/or this Final Order and Judgment (including, without limitation, whether a person or entity is or is not a Class Member; whether claims or causes of action allegedly related to this case are or are not barred or released by this Final Order and Judgment, etc.);
 - (b) entering such additional orders, if any, as may be necessary or appropriate to protect or effectuate this Final Order and Judgment and the Settlement

Agreement, or to ensure the fair and orderly administration of the settlement; and

- (c) entering any other necessary or appropriate orders to protect and effectuate this Court's retention of continuing jurisdiction.

15. No Admissions. Neither this Final Order and Judgment nor the Settlement Agreement (nor any other document referred to herein, nor any action taken to negotiate, effectuate and implement the settlement) is, may be construed as, or may be used as an admission or concession by or against Defendants as to the validity of any claim or any actual or potential fault, wrongdoing or liability whatsoever. Additionally, neither the Settlement Agreement, nor any negotiations, actions, or proceedings related to them, shall be offered or received in evidence in any action or proceeding against Defendants in any court, administrative agency or other tribunal for any purpose whatsoever, except to enforce the provisions of this Final Order and Judgment and the Settlement Agreement. This Final Order and Judgment and the Settlement Agreement may be filed and used by Defendants or Releasees to support a defense of res judicata, collateral estoppel, estoppel, release, waiver, good-faith settlement, judgment bar or reduction, full faith and credit, or any other theory of claim preclusion, issue preclusion or similar defense or counterclaim.

Certification shall be automatically vacated and this Order shall become null and void if the Settlement Agreement is disapproved by any appellate court and/or any other court of review, or if any of the Parties invoke their right to terminate their agreement to settle (pursuant to Section 11.4 of the Settlement Agreement), in which event this Order, the Settlement Agreement and the fact that they were entered into shall not be offered, received or construed as an admission or as evidence for any purpose, including the “certifiability” of any class as further

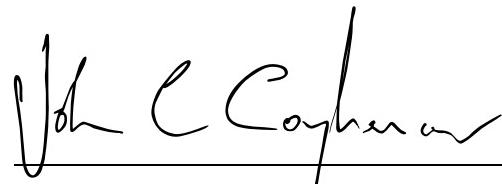
1 discussed in Section 2 of the Settlement Agreement. The Settlement Agreement itself, actions in
2 conformance with the settlement, and the other documents prepared or executed by any party in
3 negotiating or implementing the settlement called for by the Settlement Agreement, including
4 any of the terms of any such documents, shall not be construed as an admission, waiver or
5 estoppel by Defendants and shall not be offered in evidence in or shared with any party to any
6 civil, criminal or administrative action or proceeding without Defendants express written
7 consent.

9 16. Dismissal of Action. This Action, including all individual and Class claims
10 resolved in it, is hereby dismissed on the merits and with prejudice against Plaintiffs and all other
11 Class Members, without fees or costs to any party except as otherwise provided in this Final
12 Order and Judgment and the Court's separate order regarding attorneys' fees and costs and Class
13 representative stipends.

15 17. Final Judgment. This is a Final Judgment disposing of all claims and all parties.

16 SIGNED this 9th day of January, 2009.
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JOHN C. COUGHENOUR
UNITED STATES DISTRICT JUDGE

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2 **APPENDIX A**
32 **LIST OF OPT-OUTS EXCLUDED FROM THE CLASS**
34 **Case Nos. 08-0334 and 08-0403 (W.D. Wash.)**
56 **Appendix A: Final List of Opt Outs**

Name	Date Filed	Docket No.	State
Amico, Eric	12/4/2008	119	VA
Anheuser Busch Companies	12/23/2008	170	MO
Atkins, Thomas A.	11/21/2008	101	CO
Banks, Larry	10/27/2008	54	AL
Bergeron, Barbara F.	12/8/2008	142	TX
Bestic, Daniel	12/15/2008	156	OH
Blankenship, Cindy	12/8/2008	140	VA
Blankenship, Michael	12/8/2008	140	VA
Bowen, Brian T.	12/4/2008	117	SC
Brockman, Brian J.	11/10/2008	83	NE
Burgin, Janice C.	12/8/2008	144	GA
Castro, Paul D.	10/28/2008	61	NV
Clemmer, Michael J. (Esq.)	12/15/2008	155	AL
Comkornruecha, Prachak	12/15/2008	154	TN
Daly, Jacqueline	11/10/2008	82	CO
Davis, Wallace E.	12/5/2008	139	OH
Dilbert, Robert	12/3/2008	115	OH
Dipert, Robert M.	11/25/2008	106	OH
Dipert, Virginia L.	11/25/2008	106	OH
Dominey, Margaret B.	12/15/2008	157	GA
Dominey, Samuel S.	12/15/2008	157	GA
Dunwoody, Kay	10/31/2008	72	PA
Dunwoody, Scott	10/31/2008	72	PA
Evans, Barbara	11/19/2008	99	WA
Evans, James	11/19/2008	99	WA
Falls, Charles H.	11/28/2008	109	VA
Faulk, Jack as president on behalf of Jack Faulk Agency, Inc.	10/29/2008	63	KY
Faulk, Jack as president on behalf of JFA Storage Trailers	10/29/2008	63	KY
Faulk, Jack as president on behalf of Star Investments	10/29/2008	63	KY

Case Nos. 08-0334 and 08-0403 (W.D. Wash.)
Appendix A: Final List of Opt Outs

Name	Date Filed	Docket No.	State
Faulk, Jack as president on behalf of Trailer & Tractor Service, LLC	10/29/2008	63	KY
Faulk, Jack Individually	10/29/2008	63	KY
Finley, Roland	12/23/2008	169	AL
Fischer, Jack	10/31/2008	68	UT
Fitz, Joyce	11/28/2008	108	PA
Fitz, Robert	11/28/2008	108	PA
Friel, Thomas P.	11/21/2008	100	VA
Garrison, Sheryl	11/17/2008	87	OR
Gonyea, Lawrence	11/24/2008	102	NY
Goodnight, Eric V.	11/3/2008	73	IN
Hankes, Ann	12/2/2008	113	NV
Hankes, Donald	12/2/2008	113	NV
Harris, Daryl	12/22/2008	166	FL
Henderson, James	11/20/2008	98	TN
Henderson, Richard L.	10/27/2008	60	MO
Henige, Ronald A.	11/17/2008	90	MI
Hofmeister, Rod	11/20/2008	97	AK
Hollingsworth, George	11/14/2008	86	TX
Holmes, Martin D.	12/12/2008	152	TN
Holmes, Patricia	12/12/2008	152	TN
Holt, Russel C.	12/9/2008	149	VA
Howard, Fred	12/15/2008	163	SC
Howe, Bill	11/6/2008	77	AZ
Hutchens, Jill for McCart, James (deceased)	11/3/2008	79	IN
Jeffs, Lois	10/31/2008	69	UT
Johnson, Donald	12/8/2008	145	WI
Julian, Philip W on behalf of Julian Enterprises	11/17/2008	91	VA
Julian, Phillip W.	11/17/2008	91	VA
Kidder, Scott	12/11/2008	151	ME
Kingsfield, Richard	12/15/2008	159	IL
Kingsfield, Richard on behalf of Ric's Heating & Cooling	12/15/2008	159	IL
Kingsfield, Susan	12/15/2008	159	IL

Case Nos. 08-0334 and 08-0403 (W.D. Wash.)
Appendix A: Final List of Opt Outs

Name	Date Filed	Docket No.	State
Kluth, William G.	11/17/2008	89	WV
Kuykendall, Barbara	10/28/2008	62	NC
Kuykendall, Daniel	10/28/2008	62	NC
Lee, Beverly	12/15/2008	164	OH
Lee, Bob	12/15/2008	164	OH
Mackey, Terri	12/15/2008	162	FL
McCann, Madelein C.	12/22/2008	168	FL
McCann, Thomas J.	12/22/2008	168	FL
McCoy, Kenneth	12/4/2008	118	NV
McCoy, Peggy	12/4/2008	118	NV
Mitch, Clair	12/3/2008	116	PA
Mitchell, Elmer Jr.	10/30/2008	66	WV
Mosher, Daniel	10/31/2008	71	CA
Murphy, Mark	10/23/2008	53	NY
Nolan, Ronald	10/30/2008	65	CO
Olsen, Blaine	12/3/2008	114	ND
Pelton, Doris	11/28/2008	110	TX
Petrlik, Frank	11/10/2008	81	WV
Pfleiderer, John A.	12/22/2008	167	CO
Porter, Brown Jr.	11/5/2008	75	TN
Prcone, Thomas	10/31/2008	70	CO
Pruitte, Linda J.	11/24/2008	105	TN
Pucci, Erminia	12/8/2008	143	PA
Pucci, Robert	12/8/2008	143	PA
Quitiquit, Ray	12/2/2008	112	CA
Rich, Gerald G.	12/22/2008	171	VA
Rinaldi, Yvonne M.	10/27/2008	58	TX
Rock, Raymond J.	11/24/2008	104	MA
Rogers, Donald	12/8/2008	146	ID
Rosner, Michael J.	12/15/2008	161	OH
Rosner, Patricia W.	12/15/2008	161	OH
Saffell, Mike	10/29/2008	64	KS
Schmidt, Kenneth	10/27/2008	56	OH
Schulist, Joseph	12/15/2008	158	MI
Schulist, Joseph on behalf of Joseph Schulist Builders Inc.	12/15/2008	158	MI
Schulist, Nancy	12/15/2008	158	MI

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2 **Case Nos. 08-0334 and 08-0403 (W.D. Wash.)**
3 **Appendix A: Final List of Opt Outs**

Name	Date Filed	Docket No.	State
Shepard, Paul	12/1/2008	111	CA
Shindo, Makita	12/8/2008	141	CT
Small, Jeff	10/27/2008	55	TX
Small, Mary Ann	10/27/2008	55	TX
Sondles, Shelly Barnhart	11/4/2008	74	OH
Steele, Jay A.	10/27/2008	59	IL
Sumner, Richard	10/30/2008	67	OR
Swigart, Mildred A.	11/24/2008	103	OH
Swigart, Walter L.	11/24/2008	103	OH
Trottman, Dennis J.	11/13/2008	85	NY
Urban, Russel J.	11/6/2008	78	FL
Vasquez, Patricia Card	12/23/2008	172	CA
Vasquez, Ruben	12/23/2008	172	CA
Verssue, Bernard	11/26/2008	107	MO
Vickers, Charlene	11/5/2008	76	IN
Vincent, Kerry	12/9/2008	n/a	PA
Warren, Diane	12/12/2008	153	CO
Whitmore, Barbara	12/15/2008	160	NJ
Whitmore, Richard	12/15/2008	160	NJ
Wieda, George	11/17/2008	88	OH
Wieda, Marianne	11/17/2008	88	OH
Young, Bill	11/6/2008	80	CA